IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. [redacted] 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A.F.L.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, A.F.L.; and BUILDING & CONSTRUCTION LABORERS UNION, LOCAL 392, A.F.L.,

Petitioners,

v.

VOGT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

CASES:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 925

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OPINIONS BELOW

The memorandum opinion of the Circuit Court for Waukesha County, Wisconsin, is unreported and is printed in the certified record (R. 101-3). The opinions of the Supreme Court of Wisconsin are reported at 270 Wis. 315, 71 N.W. 2d 359, and at 270 Wis. 321a (contained in Wis. Advance Sheets, Vol. 272, No. 1, March 3, 1956), 74 N.W. 2d 749, and are printed in Appendix B of Petition, p. 14.

JURISDICTION

The Supreme Court of Wisconsin, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County. A timely Motion for Rehearing was filed by the Respondent herein; on July 18, 1955, and was granted on October 5, 1955. After reargument heard on January 12, 1956, the Wisconsin Supreme Court, on February 7, 1956, withdrew its original mandate and substituted a new mandate affirming the judgment of the Circuit Court. It appears that the jurisdiction of this Court is invoked by Petitioners under 28 U.S.C., Section 1257(3), since the validity of the law of Wisconsin, as interpreted and applied by the Supreme Court of Wisconsin, is drawn in question on grounds of repugnancy to the Constitution of the United States.

QUESTION PRESENTED

Whether the injunction restraining peaceful picketing by the Petitioner unions, at a place of business (Respondent's gravel pit) located on a country road and ordinarily patronized by only a small part of the public, offends the 1st and 14th Amendments to the Constitution of the United States, and which picketing was found, under the facts, to have been undertaken for the unlawful purpose of coercing or inducing Respondent to pressure or coerce its employees to join these unions, in violation of Section 111.06(2)(b) of the Wisconsin Statutes (1953). This presents no new or substantial Federal question. *Building Service Employees v. Gazzam,* 339 U.S. 532.

STATUTE INVOLVED

The pertinent provisions of the Wisconsin Statutes are set forth in the Appendix, *infra,* p. 14.

STATEMENT

Respondent, Vogt, Inc., operates a gravel pit in the Town of Oconomowoc, Waukesha County, State of Wisconsin, and there engages in the business of producing and selling washed sand and gravel and ready-mixed concrete. Its place of business is located on a country road not frequented by the general public (R. 104, 116, 122).

Petitioners (hereinafter referred to as the "Unions"), from approximately August 1953 and through Spring and Summer of 1954, unsuccessfully solicited Vogt's employees, fifteen to twenty in number (R. 107), for membership in their organizations, and these employees not only did not become members of such Unions, but indicated that they did not desire to join (R. 107, 108, 111-113, 122), and have steadfastly maintained that position (R. 122).

On July 13, 1954, the Unions commenced to picket Vogt's gravel pit, carrying signs reading as follows: "The men on this job are not 100% affiliated with the A.F.L." As a result, Vogt was deprived of the services of the several trucking companies who had been hauling goods and materials to and from its place of business, since their drivers refused to cross the picket line (R. 122). This caused Vogt to suffer substantial and irreparable damage, since its business was largely dependent upon truck transportation (R. 122, 124). No labor dispute or controversy of any kind existed between Vogt and its employees or between Vogt and the Unions (R. 122, 123).

Upon Vogt's application, the Circuit Court for Waukesha County, Wisconsin, on November 9, 1954, issued a permanent injunction restraining the picketing (which had been continuous until temporarily restrained upon commencement of that action), on the ground that such picketing was not permissible since no labor dispute, as

defined by Sections 103.535 and 103.62(3), Wis. Stats. (1953), existed.[1] The trial court found that the purpose of the picketing was to induce Vogt's employees to organize and affiliate with the Unions (R. 101, 122).[2]

On appeal, the Supreme Court of Wisconsin, in its first opinion, issued on June 28, 1955, reversed the Circuit Court, relying primarily upon *A.F.L. v. Swing*, 312 U.S. 321, as affecting the validity of Sec. 103.535, Wis. Stats. (1953),[3] (App. B. of Pet., pp. 14, 21). Subsequently, the Court below granted a motion for rehearing and ordered a reargument of the case.

On February 7, 1956, the Wisconsin Supreme Court withdrew its original opinion and substituted (one Justice dissenting) a new opinion and mandate affirming the judgment of the Circuit Court (R. 145; App. B of Pet., p. 41). In its second opinion the Court held that, under the facts disclosed by the record, the picketing had been engaged in for the purpose of coercing or inducing Vogt to pressure or coerce its employees to join the Unions (App. B of Pet., pp. 28, 29-30, 34). The Court below thus found that the picketing was undertaken for a purpose made unlawful by the public policy of Wisconsin, as expressed by Sections 111.04 and 111.06(2)(b), Wis. Stats. (1953) [Appendix, *infra*, p. 14], (App. B of Pet., pp. 26, 34), which policy guarantees employees the right of self-organization (including the right to refrain from joining a union), free from pressures or coercion from *any* source. It held, therefore, under the rule of *Build-*

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[1] These statutory provisions are quoted in the Petition, p. 3, Note 1.

[2] Respondent had requested of the trial court a finding that the purpose of the picketing was to coerce or induce it, the employer, to pressure or induce its employees to join the Unions, which finding was not adopted by the trial court (App. B of Pet., pp. 17-18, 27-28).

[3] See Note 1, above. *Cf., City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day.

ing Service Employees v. Gazzam, 339 U.S. 532, that the injunction did not violate those provisions of the Federal Constitution which protect the right of freedom of speech (App. B of Pet., pp. 27, 34).

ARGUMENT

I. The Finding which the Wisconsin Supreme Court Itself Made Was Clearly Warranted by the Evidence and the Only Possible Reasonable Inferences Which It Deduced Therefrom.

Wisconsin, by he enactment of Section 111.04, Wis. Stats. (App., *infra*, p. 14) has declared it to be its public policy that employees shall have the right of self-organization and the right to form, join or assist labor organizations, or to bargain collectively through representatives of their own choosing, and that they shall also have the *right to refrain* from any or all of such activities, free from interference, restraint or coercion from any source. In furtherance thereof, the Legislature declared it to be an unfair labor practice and a violation of that public policy to engage in any acts constituting, directly or indirectly, interference, restraint or coercion of employees in the exercise of the rights thus guaranteed. Section 111.06(2) (a) and (b), Wis. Stats. (App., *infra*, p. 14).

The Supreme Court of Wisconsin made a finding that the picketing by the Unions, Petitioners herein, had been engaged in for an unlawful objective in that it was undertaken for the purpose of coercing or inducing the employer, Vogt, Inc., to coerce or pressure its employees to become members of these Unions. Under the facts disclosed by the record, and on the basis of the inferences reasonably and justifiably to be drawn therefrom — so penetratingly analyzed in its decision (App. B of Pet.,

pp. 27-29)—the Wisconsin Court could not but conclude that

> "The inference that the picketing was conducted for an unlawful purpose is inescapable."

The Court below considered, as did this Court in *Hughes v. Superior Court*, 339 U.S. 460, 468, that there are "compulsive features inherent in picketing [which go] beyond the aspect of mere communication as an appeal to reason," and held that the undisputed material facts would admit of only one inference, i.e., that the picketing was conducted for an unlawful purpose. It recognized that the effect of the picketing was confirmatory of its purpose. Compare *Local Union No. 10 v. Graham*, 345 U.S. 192, 200.

When unions picket the place of business of an employer, and *claim* that the purpose of the picketing was to disseminate information, as here, such information could have been intended for only three possible audiences: (1) For the *employees*, although they certainly knew already that they "were not 100% affiliated with the A.F.L." (R. 106); or (2) for the *general public*, but since the general public does not frequent, to any substantial extent, a lonely country road (R. 104-5, App. B of Pet., p. 28), it could not have been the target, either. (3) That leaves only the *employer*, and it is, therefore, obvious that the picketing, here, was undertaken in order to exert coercive pressure upon Vogt, Inc.

Consider the predicament of the Respondent, Vogt, Inc., resulting from the picketing. Vogt's employees had constantly refused to be "organized" and maintained that position to the very last, as was found by the trial court (R. 122). Thereupon the Unions commenced to picket, with the result that Vogt was cut off from all truck trans-

portation (R. 122). The employer, Vogt, then had *only two alternatives:* (1) It could recognize and deal with the Union, or "induce" its employees to join the unions — in the face of the employees' refusal to become organized — and Vogt would thereby be violating the Wisconsin Stats.,[4] or (2) it could permit the continuance of the picketing and suffer the consequent economic losses, and probably be compelled to go out of business altogether.

Under these circumstances, the finding of the Court below has ample factual support and is clearly right.

II. The Decision of the Court Below Does Not Warrant Certiorari, Because No New or Substantial Federal Question Is Presented.

The Wisconsin Supreme Court has quite properly found that the picketing, here, was undertaken for an unlawful purpose, since the record, as a whole, disclosed no reasonable objective for the picketing other than to accomplish the "effect" which it had. It is settled that such picketing is *not* immune from State restraint as Con-

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[4] The applicable Wisconsin statutes read as follows:

"111.06 *What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

"(a) To interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in section 111.04.

"(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, * * *

"(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; * * *.

* * * *

"(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1)(c) of this section."

stitutionally protected free speech. *Building Service Union v. Gazzam*, 339 U.S. 532; *Hughes v. Superior Court*, 339 U.S. 460; *Teamsters Union v. Hanke*, 339 U.S. 470; *Local Union No. 10 v. Graham*, 345 U.S. 192; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490.

Petitioners assert (Pet., p. 11) that the decision of the Court below was premised upon the fact of economic damage or loss to the employer. That, however, is not correct. The basis for the Wisconsin Court's decision is the statutory guarantee of free choice of employee representatives and of the employees' right to self-organization. The economic loss is merely an incidental ingredient which, together with the other facts established by the record, establishes and proves the true objective of the Unions' activities.

These statutes, enacted by Wisconsin to guarantee employees the right of self-organization, as interpreted by the State's highest tribunal, do not, of course, deprive unions of the right or opportunity to "organize" unorganized workers, i.e., peacefully to solicit employees to become members of these unions, or to seek their representation rights. By Sec. 111.05, Wis. Stats. (1953), part of the same Act containing the statutory provisions involved in the instant case, Wisconsin has created simple and workable machinery which permits labor unions to obtain representation rights through free elections and by orderly proceedings devoid of coercive influences.

It is, of course, futile and inadmissible to judge the injunction issued here solely as an order standing alone, or only in connection with some isolated factual element related to it. Rather, it must be considered in the light of *all* of the facts, circumstances and limitations which

were considered by the Court below. See *Teamsters Union v. Hanke, supra,* where this Court said (at p. 480):

> "When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions * * * are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us."

To the same effect, *Hotel & R.E.I. Alliance v. W.E.R.B.*, 315 U.S. 437, 441.

If, under the particular circumstances of the instant case, Wisconsin could not enjoin the picketing because it was Constitutionally protected as free speech, it would enable a union effectively to put an employer out of business whenever his employees exercised their right to refrain from joining a labor organization, a right guaranteed by Wisconsin's public policy. See *Building Service Employees v. Gazzam,* 339 U.S. 532, 540-541. Such a result would be incompatible with the well-established principles, as stated by the Court below (App. B of Pet., p. 22), that "free speech is not the only right secured by our fundamental law, and that it must be weighed, here for instance, against the equally important right to engage in a legitimate business free from dictation by an outside group, and the right to protection against unlawful conduct which will or may result in the destruction of a business; that both the right to labor and the right to carry on business are liberty and property." See also *Teamsters Union v. Hanke,* 339 U.S. 470, 474; *Truax v. Corrigan,* 257 U.S. 312.

Petitioners rely especially upon *A.F.L. v. Swing,* 312 U.S. 321, as supporting their contention that the injunc-

tion, here, violated the free speech guarantee of the Federal Constitution. But that case is totally inapplicable under the instant facts, just as stated by this Court in *Building Service Union v. Gazzam*, 339 U.S. 532, at 539:

> "Petitioners insist that the Swing Case, supra, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purposes is not prohibited by the decree under review. The State has not here, as in Swing, relied on the absence of an employer-employee relationship. Thus the State has not, as was the case there, excluded 'workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' 312 U.S. 326."

For the Wisconsin Supreme Court emphasized in its opinion (App. B of Pet., p. 34) that:

> "Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

Picketing, conducted under facts and statutes similar to those here involved, whether labeled "organizational" or "recognition" picketing,* has been held in numerous

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* It is now widely recognized that there is no difference between so-called "organizational" picketing and "recognition" picketing. Petro, "Recognition & Organizational Picketing," 3 *Lab. L. J.* 819 (1952); *Blue Boar Cafeteria v. Hotel & Restaurant Union*, 312 Ky. 288, 254 S.W. 2d 335, 339, *cert. den.* 346 U.S. 834; *Wilbank v. Bartenders Union*, 360 Pa. 48, 60 A. 2d 21, 22, *cert. den.* 336 U.S. 945.

jurisdictions as being, in fact, undertaken for the unlawful purpose of causing an employer to pressure his employees into joining a union, in violation of such employees' free choice of bargaining representative, and was held to be properly enjoined.

Petitioners' claim (Pet., p. 10) that the state courts "had given varied treatment" to identical fact situations is not supported by the authorities to any substantial degree. Many of the state court cases which Petitioners cite (Pet., p. 10) antedate the more recent decisions of this Court relating to picketing and "free speech" (the *Gazzam, Hughes, Hanke, Graham* and *Giboney* cases, cited *supra*) and, in some instances, have been superseded by later decisions of the same jurisdictions. Some of these cases involved materially different facts, and nearly all of them lacked the particular statutory provisions which are here controlling.

On the contrary, situations of the instant type, involving similar statutes, have been passed upon by numerous state courts with like result. A number of these cases were heretofore presented to this Court. *Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 487, *appeal dismissed* 350 U.S. 870, "was a case strikingly similar in its facts." It was there held that peaceful picketing for organizational purposes was engaged in for an objective made unlawful by a Maine statute similar to Wisconsin's and could be enjoined. That case is discussed at length in the opinion of the Court below (App. B of Pet., pp. 31-34). In *Postma v. Teamsters Union*, 324 Mich. 347, 54 N.W. 2d 681, 684, *cert. den.* 345 U.S. 922, a case arising under almost identical facts, and in *Blue Boar Cafeteria v. Hotel & Restaurant Union*, 312 Ky. 288, 254 S.W. 2d 335, 339, *cert. den.* 346 U.S. 834, it was noted that, as here, the only way by which the employer could have escaped the picketing was

by recognizing the union or by coercing the employees to join and that, therefore, the unlawful purpose was established. The court found, in *Miami Typographical Union v. Ormerod*, (Fla. 1952), 61 So. 2d 753, that, as here, the picketing could not have been aimed at the general public, in view of its locale, and held it to have been directed at the employer in order to induce him to coerce his employees in their right to self-organization.

Compare also *Baderak v. Bldg. Trades Council*, 380 Pa. 477, 112 A. 2d 170, 173; *Sansom House v. Waiters Union*, 382 Pa. 476, 115 A. 2d 746, 750, *cert. den.* 350 U.S. 896; *Tallman Co. v. Latal*, Mo. S. Ct. (Div. No. 2), No. 43437, March 8, 1954, 33 LRRM 2725, 2729, 25 CCH Labor Cases, Par. 68,207; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; and *Self v. Wisener*, — Ark. —, 287 S.W. 2d 890, 892, where it was held that because the union had *not* solicited the employees for membership (unlike here), the record would not sustain a finding that the purpose of the picketing was to coerce the employer to force these employees to join the union. This is in harmony with the reasoning of the Court below that the fact, among others, of repeated unsuccessful solicitations did compel such a finding.

The Wisconsin Supreme Court, in deciding as it did, has followed respectable authority. No basic conflicts are apparent among those of the cases which were decided after this Court handed down its 1950 decisions in the *Hughes, Hanke* and *Gazzam* cases, *supra*. If the order of the Court below is viewed in the light of the particular facts which gave rise to it and under the limitations imposed by that Court's opinion, it becomes readily apparent that there is not presented here a new or substantial federal question, nor one having wide and general application.

CONCLUSION

The decision of the Wisconsin Supreme Court is plainly correct under the principles enunciated by this Court in *Building Service Employees v. Gazzam*, and no new or substantial federal question is presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX

The relevant provisions of Chapter 111 of the Wisconsin Statutes (1953) are as follows:

111.06 **What Are Unfair Labor Practices.**

* * * *

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employer or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * *

111.04 **Rights of Employes.** Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

* * * *